

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ENTROPIC COMMUNICATIONS, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS, INC.,

Defendant.

Case No. 2:22-cv-00125-JRG

JURY TRIAL DEMANDED

**ENTROPIC COMMUNICATIONS, LLC'S OPPOSED MOTION FOR
LEAVE TO SERVE MR. DELL'S THIRD SUPPLEMENTAL EXPERT
REPORT OUT OF TIME**

I. INTRODUCTION

Plaintiff Entropic Communications, LLC (“Entropic”) hereby requests leave to serve Mr. Dell’s third supplemental expert report after the close of expert discovery. On September 25, 2023, in response to Defendant Charter Communications, Inc.’s (“Charter”) motion for partial summary judgment of no pre-suit damages, Entropic conceded in its Opposition Brief that it was not seeking pre-suit damages for U.S. Patent Nos. 8,792,008 (the “’008 Patent”) and 8,223,775 (the “’775 Patent”). *See* Dkt. 197 at 1. Since Entropic’s damages expert, Mr. Dell, previously included calculations for pre-suit damages in his report for the ’008 Patent and the ’775 Patent, his calculations need to be updated to reflect this concession.¹ Therefore, good cause exists for this motion for leave to supplement Mr. Dell’s report in order to update his prior calculations to reflect no pre-suit damages for the ’008 Patent and the ’775 Patent.

II. LEGAL STANDARD

To determine whether a party may supplement an expert report after the close of expert discovery, the Court considers four factors: “(1) the explanation, if any, for the party’s failure to comply with the discovery order; (2) the prejudice to the opposing party of allowing the witness[] to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the importance of the witness[]’ testimony.” *Image Processing Techs., LLC v. Samsung Elecs. Co., Ltd.*, No. 2:20-cv-00050-JRG-RSP, 2020 WL 2395928, at *2 (E.D. Tex. May 12, 2020) (quoting *Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-cv-109, 2009 WL 413081, at *1–2 (E.D. Tex. Feb. 18, 2009)).

III. ARGUMENT

¹ Mr. Dell’s opening report on damages included an alternative damages calculation related to Charter’s defense of marking with respect to the ’775 Patent. *See* Ex. B to Allor Decl. at 3. Therefore, his third supplemental report simply refers back to that previous calculation.

Entropic conceded marking on the '008 Patent and the '775 Patent the same day expert discovery closed (*i.e.*, September 25, 2023). *See* Dkt. 197 at 1; Dkt. 195. Upon notification of this concession, Entropic's damages expert worked diligently to supplement his expert report to reflect the change in the damages period for these patents. On October 13, 2023, Entropic and Charter met and conferred regarding Entropic's intent to file this Motion. Allor Decl., ¶ 2; *see also* Ex. A to Allor Decl. at 2–5. Charter indicated it opposed Entropic's Motion. *Id.* That same day, Entropic served on Charter the Third Supplemental Expert Report of Stephen E. Dell, CVA, Relating to Damages. Allor Decl., ¶ 3; *see also* Ex. B to Allor Decl. Mr. Dell's third supplemental expert report contains no new facts or theories. *See generally* Ex. B to Allor Decl. Mr. Dell simply adjusted his calculations to reflect Entropic's concession. *Id.* Within its service email, Entropic indicated that it would give Charter until October 16, 2023 to review Mr. Dell's third supplemental expert report, and asked Charter to confirm that it still opposed the present motion. Ex. A to Allor Decl. at 1–2. On October 16, 2023, Charter confirmed its opposition. Allor Decl., ¶ 4; *see also* Ex. A to Allor Decl. at 1.

Charter will not be prejudiced if Entropic's Motion is granted. The sole purpose of Mr. Dell's supplemental expert report is to adjust his prior calculations to reflect updates in the case since his opening report. Indeed, Mr. Dell's adjustments *reduce* the total damages amount.

Because Mr. Dell's supplemental expert report reflects the limited adjustment of calculations regarding pre-suit damages, granting Entropic's Motion will not delay the current trial schedule.

Mr. Dell's supplemental expert report provides the Court and Charter with Mr. Dell's updated damages calculations in advance of trial. Thus, Mr. Dell's supplemental expert report will streamline trial presentation and mitigate any confusion regarding pre-suit damages.

IV. CONCLUSION

Accordingly, Entropic respectfully requests that it be granted leave to serve Mr. Dell's third supplemental expert report out of time.

Dated: October 16, 2023

Respectfully submitted,

/s/ James A. Shimota

James Shimota

Jason Engel

George Summerfield

Katherine L. Allor

Samuel P. Richey

Ketajh Brown

K&L GATES LLP

70 W. Madison Street, Suite 3300

Chicago, IL 60602

Tel: (312) 807-4299

Fax: (312) 827-8000

jim.shimota@klgates.com

jason.engel@klgates.com

george.summerfield@klgates.com

katy.allor@klgates.com

samuel.richey@klgates.com

ketajh.brown@klgates.com

Nicholas F. Lenning

Courtney Neufeld

K&L GATES LLP

925 Fourth Avenue, Suite 2900

Seattle, WA 98104-1158

Tel: (206) 623-7580

Fax: (206) 623-7022

nicholas.lenning@klgates.com

courtney.neufeld@klgates.com

Darlene Ghavimi

Matthew A. Blair

K&L GATES LLP

2801 Via Fortuna, Suite 650

Austin, Texas 78746

Tel: (512) 482-6800

darlene.ghavimi@klgates.com

matthew.blair@klgates.com

Christina N. Goodrich

Connor J. Meggs

K&L GATES LLP

10100 Santa Monica Blvd., 8th Floor

Los Angeles, CA 90067

Tel: (310) 552-5031

Fax: (310) 552-5001
christina.goodrich@klgates.com
connor.meggs@klgates.com

Peter E. Soskin
K&L GATES LLP
Four Embarcadero Center, Suite 1200
San Francisco, CA 94111
Tel: (415) 882-8046
Fax: (415) 882-8220
peter.soskin@klgates.com

Wesley Hill
Texas Bar No. 24032294
Andrea Fair
Texas Bar No. 24078488
Charles Everingham, IV
Texas Bar No. 787447
WARD, SMITH & HILL, PLLC
1507 Bill Owens Pkwy
Longview, TX 75604
Tel: (903) 757-6400
wh@wsfirm.com
andrea@wsfirm.com
ce@wsfirm.com

ATTORNEYS FOR PLAINTIFF
ENTROPIC COMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically in compliance with Local Rule CV-5(a) and served via the Court's CM/ECF system on all counsel of record on October 16, 2023.

/s/ James A. Shimota
James A. Shimota

CERTIFICATE OF CONFERENCE

The undersigned certifies that counsel for Entropic has complied with Local Rule CV-7(h). Counsel for Entropic Communications, LLC and Charter Communications, Inc. met and conferred on October 13, 2023. Charter opposes the relief sought in this Motion.

/s/ James A. Shimota
James A. Shimota